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Supreme Court U.S.
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IN THE

Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit properly applied the United States Supreme Court's "minimum contacts" analysis in finding that the Petitioner purposefully directed its activity toward the forum State.

2. Whether the Eighth Circuit properly looked to other considerations after it had found "minimum contacts" to be present, to ensure that the exercise of personal jurisdiction over the Petitioner in Arkansas would not "offend traditional notions of fair play and substantial justice."

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INTRODUCTION – WHY THIS PETITION SHOULD BE DENIED

Dassault has spent an inordinate amount of effort attempting to create for this Court the misconception of a conflict in the circuits where none exists. The Eighth Circuit's opinion is wholly consistent with the holdings of this Court, and does not raise any issues justifying the granting of the Petition for Certiorari. The present cause of action arises out of a claimed defect in a Dassault Falcon business jet that was manufactured by Petitioner, then completed and delivered to the owner/operator in Little Rock, Arkansas pursuant to a plan of marketing and distribution established by the Petitioner.

Under the uncontroverted facts, the Eighth Circuit properly found that Petitioner through its own actions had purposefully directed its products to the United States, and specifically to Arkansas, where most Falcon jets are completed, through the distribution system that the Petitioner itself established in this country. Well-settled law supports the conclusion that the Defendant purposefully availed itself of the privilege of doing business in the Arkansas forum.

The Eighth Circuit correctly held that the District Court's assertion of jurisdiction over Dassault, the manufacturer of this product, would be reasonable and fair. *Anderson v. Dassault Aviation*, 361 F.3d 449, 455 (8th Cir. Ark. 2004) The exercise of personal jurisdiction over Dassault by the State of Arkansas is predicated on the factors set forth in this Court's landmark decisions in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945); and with precedent cases within the Eighth Circuit that are likewise consonant with these and other holdings.

FACTUAL BACKGROUND

On or about October 9, 1999, while over Lake Michigan en route from Portland International Airport to Kent County International Airport, the Amway flight crew of Dassault DA-900B was authorized by air traffic control to descend to 11,000 feet MSL in preparation for landing. The flying pilot programmed the FZ800 digital flight guidance computer for this descent. As the jet neared 11,000 feet MSL, the flight crew observed that the jet was not going to capture at the appropriate altitude, so the first officer slightly pulled back on the yoke in an effort to level off. The digital flight guidance computer responded to the external slight pitch-up maneuver by initiating a nose-down trim motion. The combination of these two events caused the jet to undergo a series of violent pitch oscillations. Respondent, Beverly Anderson, was a flight attendant on board the aircraft at the time. Respondent was in the galley readying the plane for landing when the pitch oscillations occurred. She was thrown violently about the jet causing her to bounce off the floor and ceiling several times.

The Dassault Falcon 900B is only one of many jets that have been manufactured by Dassault and which have been delivered *in Arkansas* to U.S. customers. Dassault's contacts with the State of Arkansas date back several decades. Most of the contacts relate to activities through an industrial or manufacturing facility in Little Rock, Arkansas. Some of those activities have been outlined in Dassault Aviation's web site, where a timeline has been published. By 1995, "[q]uality Little Rock completions are . . . standard for Falcon customers *in both hemispheres*" [emphasis added] including those jets being sold directly by Dassault itself. By 1998, Little Rock was the "main completion center for all Falcon jets worldwide." The timeline reports that the Little Rock facility "occupies almost half a million square feet and employs more workers than any single Dassault Aviation plant in France."

Dassault's presence in the United States and Arkansas through its business jets sold under the trade name Falcon is incontrovertible inasmuch as Dassault *touts* it:

> Dassault Aviation has been present *particularly in the United States* since the start of the 1970's through its specialized Falcon subsidiary — Dassault Falcon Jet — which has three offices in Teterboro (New Jersey), *Little Rock (Arkansas)* and Wilmington (Delaware). *The Group's largest production site is in Little Rock.*

(Emphasis Added). Dassault Aviation's business jets are manufactured for, and completed in, the United States and Arkansas. These jets are delivered from France to the Group's completion and distribution center in Little Rock. Although "flight-ready" before they are flown to Arkansas, they are *completed* at the facility in Arkansas. Specifically, the exterior paint job is applied, internal furnishing and passenger seating is installed, advanced avionics, such as collision avoidance systems, and other options are installed, before the aircraft is ready to be delivered to the customer. The Group's facility in Little Rock is identified as a "Dassault" manufacturing facility, where the Dassault Falcon 900B was completed prior to being sold to its first customer.

ARGUMENT

A. There is No Conflict with Holdings of this Court. The Eighth Circuit Agrees that Ownership of a Subsidiary, *Per Se*, Does Not Establish *in Personam* Jurisdiction. Rather, Petitioner's Own Actions were Purposefully Directed at the Forum State, and its Nexus with Arkansas Goes Well Beyond Mere Ownership of Stock in a Subsidiary.

1. The Eighth Circuit's Decision Below Correctly Found "Minimum Contacts" Based Upon a Careful Consideration of the Facts.

Dassault's Petition for a Writ of Certiorari is grounded on the over-riding, yet false, premise that the Eighth Circuit concluded that jurisdiction was present merely upon the basis of Dassault's ownership of a subsidiary that is present and active in the forum state. The Eighth Circuit, however, specifically noted that "Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes *well beyond* mere ownership of [a subsidiary's] stock." (Emphasis added) *Anderson*, *supra*, at 454. The panel below appropriately noted that "*Dassault Aviation's* establishment of a distribution system in Arkansas, and marketing its products there," (Emphasis added), as well as Petitioner's other activities targeted at the forum are matters that the court appropriately considered in its "minimum contacts" analysis. The panel below noted that Dassault itself "touts . . . that its 'presence' in the United States has been especially significant in the State of Arkansas." *Id.*, at 453. It should come to no surprise to either Petitioner or this Court that the former might be called upon to defend its product in Arkansas.

Contrary to Petitioner's implication, the Eighth Circuit found it unnecessary to even consider whether or not the subsidiary was in fact Petitioner's "alter ego," because, Petitioner, through its own purposeful availment of the market and benefits of the State of Arkansas, was found to

be more than "sufficient . . . to support an Arkansas court's assertion of personal jurisdiction." *Id.*, at 452-53. The panel below noted that:

> The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of customers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere.

Id., at 453. Dassault Falcon Jet is more than a mere subsidiary of Dassault Aviation; it is the Petitioner's exclusive distributor — the main cog to Petitioner's established distribution system — for the majority of Petitioner's business jets sold worldwide. The major hub for those activities is Arkansas. The panel below found that Dassault's activities have been specifically targeted and substantial in the forum to the extent that Petitioner has even acknowledged and touted its "presence" in the state:

> Dassault Aviation states in its 2001 annual report that '*Dassault Aviation* has been present particularly in the U.S. since the start of the 1970's through its specialized Falcon subsidiary — Dassault Falcon Jet — which has three offices in Tereboro (New Jersey), Little Rock (Arkansas) and Wilmington (Delaware) The Group's largest production site is in Little Rock.' (Emphasis Added) Thus, Dassault Aviation touts in its own annual report that its 'presence' in the United States [its single largest market] has been especially significant in the state of Arkansas.

(Emphasis by the court). *Id.*, at 453. Petitioner acknowledged that its established distribution system, involving its wholly owned subsidiary, was a consolidated effort, which included making "[q]uality Little Rock [Arkansas] completions . . .

standard for Falcon customers in both hemispheres." *Id.*, at 454.

> Because the two companies have a closely intertwined business relationship, Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes well beyond mere ownership of Dassault Falcon stock. *This is not a situation in which Dassault Aviation simply placed the jet at issue 'into the stream of commerce' which fortuitously swept it into Arkansas.*

(Emphasis Added). *Id.*, at 454. Beyond Petitioner's substantial involvement in the establishment of the distribution system and activities of its exclusive distributor, the Eighth Circuit laid out Petitioner's other substantial activities carried out singularly and in concert with its wholly owned subsidiary in sustaining its business and presence in the United States and Arkansas. *Id.*, 453-55.

If anything, the Eighth Circuit's holding is predictable and foreseen, given these *admissions* on the part of Dassault that it has been present in the United States since the 1970's, particularly in Arkansas. It is bewildering that Dassault would first boast its own presence in Arkansas, and then turn around and contend that it has insufficient "minimum contacts" within the meaning of due process to be forced to defend its product in a court of law there. The Eighth Circuit's ruling below certainly does not run afoul of the holdings in jurisdictional cases that emphasize the importance of maintaining "traditional notions of fair play and substantial justice."

2. This Court's Decisions in *Asahi*, Which Featured Prominently in the Arguments Below, Support Arkansas' Exercise of Jurisdiction over Petitioner.

Not surprisingly, because the present action involves a product liability claim, this Court's opinion in *Asahi*, *supra*, played a significant part in the parties' analysis of Petitioner's activities which were directed toward Arkansas. Although the Justices in *Asahi* ultimately agreed in that case that an assertion of jurisdiction over the third party defendant, Asahi, would "offend traditional notions of fair play and substantial justice," *Id.*, 480 U.S. at 113,[1] the Court adopted essentially two differing opinions in applying the stream-of-commerce test *in the case of foreign component supplier* to determine whether the defendant purposefully availed itself of the privilege of acting in the forum state.

In analyzing the "minimum contacts" component of *in personam* jurisdiction, Justice Brennan, joined by Justices White, Marshall, and Blackmun, argued that there was no need to show "additional conduct" beyond the defendant's intent to place its product into the stream-of-commerce. Justice Brennan stated: "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come

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1. The Court noted,

> [i]n the present case . . . the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, over Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan . . . The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards.

Id., 480 U.S. at 114.

as a surprise." *Id.*, at 480 U.S. at 117. Justice Brennan noted that a majority of the circuits agree with this view. *Id.*

> A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id.

Three other members, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, in analyzing the "minimum contacts" requirement, stated that "a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State," and the "mere placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state."[2] Justice O'Connor further noted that "additional conduct" would be

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2. Justice Stevens, while declining to analyze the stream-of-commerce argument, did state that whether placing an article into the stream-of-commerce amounts to minimum contacts "requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Id.*, 480 U.S. at 127. When considered in light of the billions of dollars worth of jets that have been regularly flown in and out of Arkansas and sold to United States and Arkansas companies and residents, it is clear that Justice Stevens' analysis would likewise mandate the exercise of personal jurisdiction.

indicia of an "intent or purpose" on the part of the defendant manufacturer:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or *marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.* But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

(Emphasis Added) *Id.*, 480 U.S. at 112.

As noted, the majority of states and circuits, including the Eighth Circuit, have chosen to adopt the more expansive approach reflected in Justice Brennan's opinion regarding the extent to which "other factors" come into play under a stream-of-commerce theory. *Asahi*, 480 U.S. at 117. Nevertheless, the analysis and holding of the panel below withstands scrutiny even under the more strenuous test posed by Justice O'Connor.

The Eighth Circuit below found that the evidence established that the Petitioner's activities were purposefully directed toward the forum state. *Anderson*, at 454. "We conclude that Dassault Aviation 'purposefully directed its products to the United States,' *and specifically to Arkansas*, where most Falcon jets are completed, 'through the distribution system it set up in this country.'" (Emphasis Added) *Id.* Petitioner "clearly intended to reap the benefits" of its wholly owned exclusive distributor's substantial presence in Arkansas, "[g]iven the central importance of the

Little Rock completion center to the success of Dassault Aviation's worldwide sales of business jets, and Arkansas' specific and identifiable role in Dassault Aviation's unified marketing endeavors with Dassault Falcon Jet[.]" *Id.*, at 454-55.

3. The Eighth Circuit Acknowledged that Ownership, By Itself, of a Subsidiary is Not Enough to Establish Jurisdiction Over the Parent; the Panel Adopted this court's "Minimum Contacts" Analysis.

Petitioner intimates that the Eighth Circuit's holding below allows for Dassault's mere ownership of DFJ to serve as a sufficient basis for jurisdiction. This representation is completely erroneous. The Eighth Circuit followed the most conservative perspective regarding the effect that *International Shoe* and its progeny have had on this Court's holding in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). *Cannon* stood for the proposition that ownership of a subsidiary, without more, is insufficient to establish jurisdiction.[3] The Eighth Circuit has agreed with this principle, finding that Dassault's relationship with its agent in America "goes well beyond mere ownership of Dassault Falcon jet stock." *Anderson*, 361 F.3d at 454.

Petitioner suggests that the Eighth Circuit has somehow disavowed or ignored the core holding of *Cannon*. This subliminal undertaking is evident through Petitioner's citation of cases which hold that the mere ownership, *per se*, of a subsidiary does not subject the parent to *in personam*

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3. *Cannon*'s breadth at that time confined itself to situations where the subsidiary was *not* the agent of the parent. *Curtis Publishing Company v. Cassel*, 302 F.2d 132, 137 (10th Cir. Kan. 1962) ("At the very least there is strong implication in the *Cannon* decision that a corporation may be present [in the forum state] *through an agent.*") (Emphasis Added)

jurisdiction in the state where the subsidiary does business. *See, e.g., I.A.M. National Pension Fund v. Wakefield Industries, Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983) ("the relationship of parent and subsidiary *alone* would not suffice" for "service on the parent to reach a foreign subsidiary") (emphasis added); *Gray v. Riso Kagaku Corp.*, 1996 WL 181488, at 3 (4th Cir. Apr. 17, 1996) ("*mere* fact that Riso Kagaku's subsidiaries do business in South Carolina does not confer personal jurisdiction over Riso Kagaku") (emphasis added). Petitioner's reliance upon *Cannon* is misplaced because the Eighth Circuit's holding acknowledges, agrees with, and in no way deviates from, the "mere ownership" maxim.[4]

4. *International Shoe*: Due Process Allows for Establishing Jurisdiction Over a Foreign Defendant that is Not Physically Present in the Forum State.

International Shoe held that due process only requires that a defendant not present within the territory of the forum need only have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.*, 326 U.S. at 316, *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940). *International Shoe* held that a

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4. *Cannon*, which pre-dated this Court's decision in *International Shoe* by twenty years, dealt with a contract transaction executed in Maine. Justice Brandeis intended to explore the parent-subsidiary relationship in common law terms rather than constitutional terms. It is questionable whether *Cannon* has any constitutional relevance today, given the changes in the jurisprudential landscape brought by *International Shoe* and its progeny. *See* Lea Brilmayer and Kathleen Paiseley, "Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency," 74 Cal. L. Rev. 1, 3-4 (1986), *citing* P. Blumberg, *The Law of Corporate Groups*, 43-47 (1983).

foreign corporation which had "minimum contacts" in the forum state could be "present" for purposes of *in personam* jurisdiction.

> [A] wholly owned subsidiary may be an agent and when its activities as an agent are of such character as to amount to doing business of the parent, the parent is subjected to the *in personam* jurisdiction of the state in which the activities occurred. While *International Shoe* does not repudiate the "presence" doctrine it, at the very least, permits presence to be inferred from "minimum contacts."

Curtis Publishing, *supra*, at 137.

This Court has never held that a corporate defendant can avoid personal jurisdiction simply by dispatching its agents to the forum state to conduct the former's business. Such a myopic rule would ignore the realities of today's globalized market and methods of distribution. Since at least 1945 (with *International Shoe*), it has been well established that physical presence within the forum state is *not* a prerequisite to the exercise of personal jurisdiction. *See International Shoe*, at 316.

This Court need look no further than the text of *International Shoe* for support of the exercise of *in personam* jurisdiction over the Petitioner in the State of Arkansas. *International Shoe* stated that a corporate defendant's "presence" within the forum state can only be manifested, as a practical matter, by activities carried on its behalf by those who are authorized to act for it. *Id.*, 326 U.S. at 316. The terms "present" or "presence" are used merely to symbolize those activities of the corporation's *agent* within the state. This kind of "presence" is sufficient for purposes of due process. *Id.*, 326 U.S. at 317.

Overall, *International Shoe* purposefully kept its language flexible and its sweep broad. This malleability is exemplified by Chief Justice Stone's statement that satisfying due process in these cases would be dependent upon the "quality and nature of the corporation's activity in relation

to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.*, 326 U.S. at 319. In addition to its own activities, Dassault relied extensively upon its American *agent* to complete, distribute, and market Falcon jets in the United States, and specifically Arkansas, thereby rendering the Petitioner amenable to suit in Arkansas within the broad meaning of *International Shoe* itself.

5. The Eighth Circuit Appropriately Recognized that the Relationship Between Dassault Aviation and Dassault Falcon Jet Goes Well Beyond a Parent's Mere Ownership of a Subsidiary.

The Eighth Circuit acknowledged that the *mere* ownership of a subsidiary does not subject the parent to *in personam* jurisdiction in the state where the subsidiary does business. *Epps v. Stewart Information Services, Inc.*, 327 F.3d 642 (8th Cir. 2003). Distinguishing the facts in *Epps*, however, the Eighth Circuit below correctly held that "Dassault Aviation's contacts with Arkansas go well beyond mere ownership of Dassault Falcon Jet." *Anderson, supra*, 361 F.3d at 452.

Petitioner's subsidiary is part of a distribution system in Arkansas established by Petitioner for the purpose of completing, distributing and marketing its products there. Arkansas is the major hub for the Dassault Group's business operations in the United States. The Eighth Circuit below noted that:

> The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of customers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere.

Anderson, 361 F.3d at 453. Dassault Aviation has established

a plan of distribution, including distributorship agreements with its subsidiary, in which, *inter alia*:

- The subsidiary is appointed "the exclusive distributor for the sale and lease of all Falcon model aircraft" in Petitioner's single-largest market, the United States.
- With regard to specified sales, Dassault Aviation requires that the exclusive distributor "coordinate all of its sales efforts with Dassault Aviation and inform Dassault Aviation of all follow-up of its negotiations."
- Dassault Aviation has agreed to support the distributor's sales efforts in providing appropriate technical data and performance information.
- Dassault Aviation requires Dassault Falcon Jet to "pursue diligently and with its best efforts the sale and lease of Falcon Aircraft."
- Dassault Aviation requires its subsidiary to advise the former of "the identity of its prospective agents, sales representatives and/or dealers prior to their appointment."

The only way a customer in Dassault Aviation's single largest market in the world can acquire any of Dassault Aviation's Falcon jets is through the company's exclusive United States distributor, DFJ. The marketing, service and sales efforts of DFJ are clearly designed to — and do — substantially generate revenue for its parent, Dassault Aviation. In the last decade as much as 81% of the revenues of Dassault's civil aircraft division in any fiscal year were attributable to the activities of DFJ. Dassault Aviation created and owns its exclusive distributor in the United States. DFJ was established as Dassault Aviation's wholly owned subsidiary after Dassault Aviation had first formed a "joint venture" with its former United States distributor and then

later bought out the non-affiliated partner. Dassault Aviation has furnished the CEO and the President, two chief operating and executive officers, of DFJ. Dassault Aviation has agreed to provide sales and service support for its U.S. distributor.

Dassault's agent does *not* manufacture a product independent of the parent; rather, it works with Dassault to market and distribute the Dassault Falcon Jets pursuant to the established plan of distribution. It also completes the manufacture of these business jets according to the specifications of Petitioner and the customers and provides after-sale service in Arkansas. It is a process that, but for the existence of its American agent, would out of necessity be the responsibility of Dassault itself.[5] Dassault, in its plan of distribution, utilizes and relies upon its agent and subsidiary extensively to maintain a competitive edge in the United States. The "close, synergistic" or "symbiotic" relationship between Dassault and its agent is true and obvious, which is why the Eighth Circuit chose to use those words in describing it.

6. "More Recent Doctrinal Refinements" Support the Eighth Circuit's Finding of *In Personam* Jurisdiction over Dassault.

Notwithstanding Petitioner's making much ado over the false assertion that "more recent doctrinal refinements" to *International Shoe* are unreflected in the Eighth Circuit,[6] the

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5. When a company acts through a subsidiary as its agent in the forum state to do what it otherwise would have done itself, it clearly has purposely availed itself of the privilege of doing business in the forum. *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1083 (E.D. Pa. 1992). No better example exists to support this realization than the "close, synergistic" and "symbiotic" relationship between Dassault and its American agent.

6. Petitioner cites a law review article, 34 Seton Hall L. Rev. 807, by Charles Rhodes, as support for the notion that Judge Blackmun's analysis "fails to reflect this Court's more recent doctrinal refinements." (Petition, page 22, footnote 5)

decision of the panel below is completely congruent with this Court's opinions in *Burger King*, *World-Wide Volkswagen*, and *Asahi*, *supra*. Petitioner's reference to "more recent doctrinal refinements" is misleading because decisions which followed *International Shoe* have been universal in extolling the flexibility and permissiveness of the "minimum contacts" doctrine, given the evolution of communication and transportation in our modern society. *See*, *e.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.")

In later years, this Court would adopt additional terms that have become a part of the analytical framework. As stated above, *International Shoe* itself held that a nonresident defendant need not be physically present in the forum state in order to be subjected to jurisdiction there. *Id.*, at 316. This premise has been refined in recent years by the "purposeful availment" requirement provided by *Burger King*. A defendant who has purposefully directed his activities to the forum state has "fair warning" that his actions would render him amenable to suit in the forum state for injuries that relate to his contact there. *Burger King*, 471 U.S. at 472-75. "Contacts" are not limited to those acts which are physically performed within the forum state, but include acts that are performed outside the forum state, which would have an *effect* on the forum state. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88-96 (1980). Overall, the *in personam* jurisdictional limits imposed on the states by the due process clause, "in its role as guarantor against inconvenient litigation, have been substantially relaxed over the years." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 564-65 (1980).

Lastly, this Court's opinion in *Burger King* made it clear that the "substantial connection" between the defendant and

the forum state necessary for a finding of minimum contacts may come about by an action of the defendant purposefully directed toward the forum state. *Id.*, 471 U.S. at 476. If establishing minimum contacts through "purposeful availment" is characterized as a "recent doctrinal refinement" to *International Shoe*, then it is certainly a refinement that operates to the advantage of plaintiffs.

B. Contrary to the Petitioner's Claim, the Eighth Circuit Did *Not* Rely Upon a "Multi-Factor" Balancing Test, or Any other "Test," Aside from What is Required by *International Shoe*.

After establishing the "substantial nexus" that Petitioner had with the State of Arkansas, the Eighth Circuit only then looked to "other considerations," which "*also* support the exercise of personal jurisdiction." (Emphasis Added) *Anderson*, *supra*, at 455. As noted above, the Eighth Circuit first found that Petitioner had "minimum contacts" with the State of Arkansas, and that Petitioner's activities were such that "it would not violate traditional notions of fair play and substantial justice for an Arkansas court to assert personal jurisdiction in this action." *Id.* The Eighth Circuit below found that the Petitioner's contact with the State of Arkansas results, "in large part, from its business relationship" with its American agent, with operates a large production site in Little Rock that completes Falcon jets to customers' specifications. *Id.*, 361 F.3d at 452.

Additionally, the Eighth Circuit found that the relationship between Dassault and its American agent is symbiotic and closely synergistic, which it clearly is. At every available turn in its Petition, Dassault has derisively placed those words in quotations, all in a misleading attempt to intimate that the Eighth Circuit has developed a new test called the "close, symbiotic relationship" test.[7] A closer

7. Dassault cites this Court to *Enterprise Rent-A-Car Co. v. U-Haul Int'l, Inc.*, 327 F. Supp. 2d 1032 (E.D. Mo. July 22, 2004), (Cont'd)

examination of the decision below reflects that no such "test" was adopted by the Eighth Circuit. Rather, the Eighth Circuit found that the relationship between Dassault and its agent was, indeed, "synergistic," and "closely symbiotic," which says more about the Eighth Circuit's descriptive word choice than about any "test" that it applied. Judge Arnold's well-scripted opinion below speaks for itself in establishing the "minimum contacts" standard enunciated in *International Shoe* and made even more fungible by this Court's "more recent doctrinal refinements." The "close, symbiotic relationship test" is a misleading and fantastical invention of the Petitioner.

In addition to the closeness of Dassault to its agent in America, the Eighth Circuit placed considerable emphasis on the economic benefit that Dassault has achieved from its Group's Little Rock facility:

> Dassault Aviation itself has paid over $126 million to Dassault Falcon Jet in the seven years preceding the filing of this action for completions done in Little Rock to Falcon jets that Dassault Aviation then sold to other parties.

Id., 361 F.3d at 453. The Eighth Circuit relied upon information posted on the website (*www.dassaultfalcon.com*) that Petitioner operates and administers jointly with its American agent:

> The companies indicate their pride in the Arkansas facility and its importance to their success by

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(Cont'd)
for the erroneous proposition that a novel "symbiotic relationship test" now exists in the Eighth Circuit. While the district court in *Enterprise* have found that the relationship between a parent and subsidiary to be "symbiotic," the district court never applied a "symbiotic relationship" test, preferring instead to apply the same traditional "minimum contacts" analysis that the Eighth Circuit in this case followed. *Id.*, 1036-37.

> noting on their website that the Little Rock completion center is "one of the best-equipped and most efficient facilities anywhere — the envy of the completion industry — another testament to the Dassault Falcon passion."

Id. The Eighth Circuit pointed out (most likely to avoid any more confusion than may already have been caused by Dassault's persistent blurring of its image and logo with that of its agent) that "Dassault Falcon" in the context of the statement above does not refer to DFJ. Rather, "Dassault Falcon" refers by name to the division of *Dassault Aviation* that specializes in Falcon business jets. *Id.*, 361 F.3d at 453-54.

The Eighth Circuit also appreciated that Dassault Aviation participates in publishing a "Falcon Operator Directory" that gives a listing of seventeen Dassault jets owned and operated by persons or companies in Arkansas. This directory also gives the name of a "field service representative" in Little Rock who provides services and information to Falcon operators in Arkansas. The directory likewise provides an "authorized service center" for Falcon jets in Little Rock and a designated salesperson for potential Arkansas customers. *Id.*, 361 F.3d at 454. The directory specifically deals with the business jets, such as the Dassault Falcon 900B *sub judice*, sold by the Petitioner, Dassault.

The vast majority of all Dassault's business jets sold worldwide are completed in Little Rock, Arkansas, including the Dassault Falcon 900B in which Respondent was injured. Dassault purposefully availed itself of the privilege of doing business in the forum state through its business relationship with its agent and exclusive distributor, who happens to also be its wholly-owned subsidiary. Especially, inasmuch as Dassault has admitted that it has been present in the United States since the 1970s, particularly in Arkansas, the Eighth Circuit properly (and to no surprise) found that Dassault had

purposely availed itself to the forum state and, therefore, had "minimum contacts" with the State of Arkansas. It defies common sense and credulity to suggest that Dassault would be surprised that it would be expected to defend one of its products in an Arkansas courtroom, or that it cannot be fairly haled into an Arkansas courtroom, or that jurisdiction in Arkansas over Dassault would "offend traditional notions of fair play and substantial justice."

1. The Eighth Circuit Did Not Adopt a Multi-Factor Test; Its Decision is Consistent with *Burger King* and Considered "Other Factors" After Minimum Contacts Had Already Been Established.

In an obvious attempt to once again create a conflict where none exists, Petitioner cites to *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), for the proposition that the Eighth Circuit in the present case adopted a "multi-factor balancing test" that is inconsistent with "more recent doctrinal refinements" enunciated by this Court. A simple reading of the Eighth Circuit's opinion demonstrates that the panel did not rely upon, or even cite, *Aftanase*.[8] Rather, consistent with this Court's "more recent doctrinal refinements," the panel looked to other considerations "once it [had] been decided that [the defendant] purposefully established minimum contacts with the forum State." *Burger King*, 471 U.S. at 476, cited at Petitioner's Brief, pg. 17.

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8. Although the Eighth Circuit in this case did not cite *Aftanase*, Judge Blackmun pointed out that:

> the boundary line [in this analysis] 'cannot be simply mechanical or quantitative.' Rather, 'it is the quality and nature of the activity in relation to the fair and orderly administration of the laws.' Activity gives rise to obligations and, to the extent these are connected with activity within the state, responsiveness is not undue.

Id., 343 F.2d at 195-96 (internal citations omitted).

These "other factors" are discerned clearly in the texts of U.S. Supreme Court opinions of *McGee*, *supra*, 355 U.S. at 223, 78 S. Ct. at 201; *Kulko California Superior Court*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697 (1978); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 564-65 (1980); and *Burger King*. Consideration of these factors conforms with the analytical framework endorsed and promulgated by this Court, are completely derivative of this Court's holding in *International Shoe*, and are in no wise inconsistent with the body of cases that have flourished in the decades that have followed.

These considerations are consistent with, and draw heavily from, this Court's precedent cases. A closer examination of *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868 (1984), as well as *Burger King*, *supra*, *World-Wide Volkswagen*, *supra*, and *Asahi*, *supra*, bolsters the validity of this claim, because these "other considerations" emanate from U.S. Supreme Court opinions that followed *International Shoe*.

2. The Present Case "Arises out of, or is Related to," the Petitioner's Forum State Activity; In Any Event, Petitioner Has Had "Continuous and Systematic Contact" with Arkansas Since the 1970s.

The present case involves an action that arises out of and/or is related to Petitioner's contacts with the State of Arkansas; therefore, this case would constitute a case of "specific jurisdiction."[9] All of Dassault Aviation and its

9. This Court in *Helicopteros* noted that all parties had stipulated that the plaintiffs' cause of action against the Colombian corporation did not "arise out of" and was not "related to" that corporation's contacts with the State of Texas. Notwithstanding the parties' stipulations, Justice Brennan, dissenting, found that the "undisputed contacts" that existed in the case between Helicol and the State of Texas were "sufficiently important, and sufficiently *related* to the underlying cause of action," to warrant the exercise of that state's in (Cont'd)

subsidiary's activities relate directly to the sale and distribution of Falcon jets throughout the United States, including jets that are sold, owned and operated in Arkansas. The jet that is the subject of the present action, like the majority of all Falcon jets manufactured by Dassault Aviation, was "completed" at the Dassault Falcon Jet facility in Little Rock, Arkansas. The subject Dassault Falcon 900 was also delivered in a defective state to its customer *in Little Rock, Arkansas*.

Petitioner's attempt to convince this Court that a product liability action cannot "relate to" or "arise out" of its activities with the State of Arkansas, simply because the accident itself did not occur there, ignores the realities of modern commerce and tort law. An accident, by definition is an unplanned event, which relates very little, if at all, to a reasonable expectation of what forum has a greater interest in, or relation to, the subject litigation. *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 738 (8th Cir.), *cert. denied,* 516 U.S. 814, 116 S.Ct. 67, 133 L.Ed.2d 28 (1995). Rather, the most significant aspects of a product liability action as they relate to a defendant are most concerned with the defendant's activities *before* the accident or injury producing event, including the marketing and delivery of the product at issue.

Arkansas has a significant interest in seeing that products that are being deliberately brought into the state, and sold to and/or transporting its residents, are safe. *Dassault*, at 455 ("Furthermore, Arkansas has a substantial interest in the matter to be litigated, as the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products."); *Clune v. Alimak AB*, 233 F.3d 538, 546 (8th Cir. Mo. 2001), *cert. denied*, 533 U.S. 929, 121 S. Ct. 2551 (2001). Even though the accident itself did not occur in the State of Arkansas, it is incontrovertible that the Dassault Falcon DA-900B business jet was manufactured by

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personam jurisdiction over the foreign defendant. (Emphasis Added) *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting)

the Petitioner in France, and then ferried to the Group's major facility in Little Rock, Arkansas, owned and operated by the Petitioner's exclusive distributor and wholly-owned subsidiary, where it was completed and sold to its customer. The delivery of this completed product to Amway took place in Arkansas. Respondent's products liability claim arises out of, and is related to, Petitioner's activities in the State of Arkansas. Therefore, this action is one clearly involving specific jurisdiction inasmuch as the alleged wrongful conduct committed by these defendants (*to wit*: delivering a defective product to a customer) occurred in the forum State.

In any event, the record demonstrates that Petitioner's activities directed at the State of Arkansas have also been "continuous and systematic," sufficient to justify even the exercise of "general jurisdiction." Indeed, "since the 1970's," Dassault's presence it Arkansas has been regular, continuous and systematic. Petitioner has in more recent years pursued a systematic consolidation and unification of identity with its subsidiary, which operates in Arkansas the single largest production facility for Dassault Falcon jets worldwide. The vast majority of Dassault business jets sold worldwide are flown in and out Arkansas to be completed. The Dassault Group's Little Rock facility also serves as a major service facility for the business jets after their manufacture. Hence, "general jurisdiction" is equally present.

3. This Court in *Burger King* Formally Endorses the Consideration of "Other Factors" Following a Finding of "Minimum Contacts."

In *Burger King*, a franchisor brought suit in a Florida court against a Michigan franchisee. The franchisee contended that he was not subject to *in personam* jurisdiction in Florida because he was a Michigan resident and the plaintiff's claim did not "arise" within Florida. In holding that jurisdiction comported with due process, this Court, per Justice Brennan, cited *International Shoe*, *supra*, for the

proposition that once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of *other* factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Id.*, 471 U.S. at 462. In answering what "other factors" may be in the context of a jurisdictional analysis, this Court added the following:

> Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial systems's interest in obtaining the most efficient resolution of controversies," and the shared interest of the several States in furthering fundamental substantive social policies." [*citing World-Wide Volkswagen, supra*] *These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.*

(Emphasis Added). *Burger King*, 471 U.S. at 462. *Burger King* unveils a strong endorsement of the considerations that the Petitioner erroneously calls the "multi-factor test." Consideration of these factors accedes entirely with this Court's decision in *Burger King*.

Dassault purposefully directed its activities to the forum state. Dassault has relied upon its agent in the United States to provide distribution services which otherwise would have to be performed by Dassault itself in order to maintain a competitive edge in the American market. *Burger King* supports the exercise of personal jurisdiction over Dassault under these circumstances because the delivery of this unfinished business jet to the Dassault Group's completion and distribution center in Little Rock demonstrates a purpose on the part of Dassault to *target* the forum state for its own financial enrichment.

C. Challenges to Jurisdiction Based on Distributorship Agreements Have Been Rejected by this Court Inasmuch as Such Jurisdiction Derives from Language Explicitly Found in *International Shoe* and *Asahi*.

The distributorship agreement between Petitioner and its American agent featured prominently in the Eighth Circuit's finding that Arkansas could properly exercise *in personam* jurisdiction over Dassault Aviation. DFJ is Dassault's distribution plan for the Western Hemisphere, through which these business jets are marketed throughout the United States, including Arkansas. This arrangement is certainly more closely-held, and altogether less tenuous, than the relationship that existed in *Tobin v. Astra Pharmaceutical Prod., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993), *cert. denied, sub nom. Duphar v. Tobin*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993). In that case, the plaintiff filed a products liability suit against Duphar, the Dutch manufacturer of a drug called ritodrine, and against Astra Pharmaceutical, Duphar's United States distributor. Plaintiff's claim against Duphar was dismissed for lack of *in personam* jurisdiction. The Sixth Circuit reversed, holding that Duphar had purposefully availed itself of the United States market by virtue of its distributorship agreement with Astra. *Id.*, 993 F.2d at 544. The court noted that "Duphar did not merely sell its product on the market with no direction in mind." *Id.*

Duphar petitioned this Court for a writ of certiorari, which was denied. *Id.*, 510 U.S. 914, 114 S. Ct. 304 (1993). In opposition to the petition for a writ of certiorari, the respondent in that case made the following argument:

> Duphar did not simply place its product in a stream of commerce which haphazardly swept it to the forum. Duphar formally entered into an elaborate licensing agreement with Astra providing that Astra would distribute ritodrine in "the United

> States of America, its territories and possessions, and Puerto Rico. *Such an agreement would have been no different if it had listed each of the fifty states by name: it is a deliberate decision to market in the forum state.*

(Emphasis Added). *Duphar v. Tobin*, Respondent's Brief in Opposition, 1993 WL 13076322 (1993). The plan of distribution in the instant case is substantially more targeted at the forum state than was true in *Duphar*. In addition to the fact that the Dassault-DFJ relationship is even more closely-knit than that of Duphar and Astra, Petitioner's plan of distribution has specifically targeted Little Rock, Arkansas, as the Group's hub for the completion and distribution of Falcon jets worldwide. ("Little Rock is now the main completion center for all Falcon jets worldwide." *Anderson*, at 453.)

Numerous courts inside and outside the Eighth Circuit have agreed that a manufacturer who distributes its product through a national or regional distributor establishes minimum contacts with the states in which the distributor operates. *See, e.g., Tobin, supra*; *Clune, supra*[10]; *Warren v. Honda Motor Co.*, 669 F. Supp. 365, 370 (D. Utah 1987); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 777 (D. Kan. 1987); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987); *Burton v. Subaru of America*, 646 F. Supp. 78 (N.D. Ga. 1986); *Waters v. Deutz Corp.*, Del. Super., 460

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10. The *Clune* opinion that featured prominently below was also denied for review by this Court. In that case, a Swedish manufacturer's products were sold in the United States through two distributors. Like Dassault in the present action, the defendant maintained that had no direct contacts with the forum state, but relied upon its exclusive distributor. The Eighth Circuit found that the defendant had done more than merely placing a product in the stream of commerce. "The record shows [that the defendant] created the distribution system that brought the [product] to [the forum state.]" *Clune*, 233 F.3d at 543.

A.2d 1332, 1337-38 (1983). Dassault Aviation purposefully directed its activities to the state of Arkansas and established contacts in the state of Arkansas through its American agent. It cannot be said that Dassault merely placed a business jet into the stream of commerce that somehow, fortuitously found its way to Arkansas. The Eighth Circuit below found this to be evident. *Anderson*, *supra*, 361 F.3d at 454. Additionally compelling is the truism that this jet did not become a completed product until it had already arrived at the Dassault Group's facility in Little Rock.

This Court correctly denied the petitions for writs of certiorari in *Tobin* and in *Clune*, as it should likewise do in the instant case. The Sixth Circuit in *Tobin* relied upon this Court's plurality opinion in *Asahi*, *supra*, for the proposition that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state" can "indicate a purpose to serve the market in the forum state." *Tobin*, *supra*, 993 F.2d at 544. The Eighth Circuit in *Clune* relied upon this Court's opinion in *Burger King* for the proposition that the "baseline for minimum contacts is 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Clune*, *supra*, 223 F.3d at 542.

It has been incontrovertible throughout the proceedings below that Dassault Aviation has designated DFJ to be its "exclusive distributor" for Falcon aircraft in the United States. Dassault's agent has actively solicited (and acquired) billions of dollars worth of business with customers in the United States, including Arkansas. All of these activities have been undertaken with the direction, knowledge, and consent of Dassault. The United States is by far the single largest market for Dassault's business jets, and the Little Rock completion center is the largest facility in the Dassault Group. Clearly an average of almost three-quarters of Dassault Aviation's business jet sales are attributed to its agent in the

United States. Finally, the vast majority of all Dassault's business jets sold worldwide are completed at the Group's facility in Little Rock, Arkansas, including the Dassault Falcon 900B *sub judice*. Any notion that Dassault cannot be fairly haled into an Arkansas courtroom does considerable violence to this Court's holdings in *International Shoe*, *Burger King*, *World-Wide Volkswagen*, *Asahi*, and other cases. The Eighth Circuit's decision below relied upon, and is supported by, settled law, thereby justifying denial of the Petition.

CONCLUSION

For the foregoing reasons, this Petition should be denied.

Respectfully submitted,

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